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Department of Business & Industry

OFFICE OF THE LABOR COMMISSIONER

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NOTICE & AGENDA OF PUBLIC MEETING

TASK FORCE ON EMPLOYEE MISCLASSIFICATION

The Department of Business and Industry, Task Force on Employee Misclassification will conduct a meeting on the following day, time, and location.

**Online Meeting: Join from your computer, tablet, or smartphone.
Task Force on Employee Misclassification
Wednesday, June 16, 2021, 9:00 AM - 10:30 AM (PST)**

Please join my meeting from your computer, tablet, or smartphone.

<https://businessnv.webex.com/businessnv/j.php?MTID=m8ab78e05dc6cdb712119a8506600c92c>

Pursuant to Assembly Bill 253, passed during the 81st Regular Session of the Nevada Legislature (2021), the meeting will be conducted by means of teleconference/videoconference.

Members of the public may participate in the meeting and submit public comment by logging into the webinar by accessing the following link:

<https://businessnv.webex.com/businessnv/j.php?MTID=m8ab78e05dc6cdb712119a8506600c92c>.

Join by phone: 1-844-992-4726 United States Toll Free +1-408-418-9388 United States Toll

Access code: 146 032 2922

This option will require a computer with audio capabilities. Additionally, public comment can be submitted prior to, during, and up to 30 minutes after the meeting is adjourned via email to: mail1@labor.nv.gov. Public comment received prior to the meeting will be read into the record. Public comment received during the meeting and within 30 minutes of meeting adjournment will be added to the record.

Attached is an agenda of all items scheduled to be considered. Items may be taken out of the order presented on the agenda; items may be combined for consideration by the public body; discussion on items may be delayed; and items may be pulled or removed from the agenda at any time.

The Task Force on Employee Misclassification may put reasonable restrictions on time, place, and manner of public comment. Comments based upon viewpoint may not be restricted. Public comment will be limited to three (3) minutes per person, per item.

AGENDA

1. Call to Order and Roll Call.
2. Public Comment
3. Approval of Minutes from April 6, 2021, meeting.
4. Approval of Minutes from Subcommittee meetings.
March 15, 2021 – Agency Review and Policy Subcommittee
April 6, 2021 – Legislative and Industry Subcommittee
5. Approval of “Draft Annual Report” to be submitted to the Nevada Legislature.
Shannon Chambers, Nevada Labor Commissioner.
6. Legislative Updates.
Shannon Chambers, Nevada Labor Commissioner.
7. Agenda items and meeting dates for next fiscal year (for discussion).
8. Public Comment.
9. Adjournment.

This meeting has been properly noticed and posted at the following locations: Department of Business and Industry Director’s Offices in Las Vegas and Carson City; Nevada Office of the Labor Commissioner; as well as online at www.labor.nv.gov and www.notices.nv.gov.

Note: We are pleased to make reasonable accommodations for members of the public with a disability. If special arrangements for the meeting are necessary, please notify Rosiland McCloud at (775) 684-1890 or RMcCloud@labor.nv.gov or mail@labor.nv.gov as soon as possible.

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**TASK FORCE ON EMPLOYEE MISCLASSIFICATION
MEETING MINUTES – APRIL 6, 2021**

1. Call to Order and Roll Call.

The meeting was called to order at 9:45 a.m. Roll Call and Quorum.

2. Public Comment.

There was no public comment.

3. Approval of Minutes from February 23, 2021, meeting.

A motion to approve the minutes as written was made by Tom Burns and seconded by Margi Grein. The motion passed unanimously.

4. Presentation from United States Department of Labor.

Higinio Ramos – District Director, Las Vegas District Office
Wage and Hour Division, United States Department of Labor

The Wage and Hour Division of the United States Department of Labor (US DOL) presented this item. Ms. Susana Sanchez, Investigator, United States Department of Labor, provided information on the definition of an employee under the Fair Labor Standards Act (FLSA) and the “Economic Realities Test” that is utilized by the US DOL to evaluate whether a worker is an employee or an independent contractor. Investigator Sanchez went over the 6 factors that are considered when evaluating whether a worker is an employee or an independent contractor under the FLSA.

Higinio Ramos, District Director, Las Vegas District Office, US DOL, gave information on the enforcement options and penalty structure that is utilized by the US DOL when a worker is found to have been misclassified as an independent contractor under the FLSA. Mr. Ramos and Shannon Chambers, Labor Commissioner, included information on how our offices work together and share information on wage and hour issues and misclassification issues.

Additional information on the use of independent contractors in certain industries was provided and the Task Force on Employee Misclassification (Task Force), US DOL representatives, and Ms. Chambers, discussed potential regulatory and rule changes at the federal level on independent contractors based on a new Secretary of Labor and potential new enforcement priorities for the US DOL leaning towards classifying more workers as employees versus independent contractors.

5. Reports on Subcommittees – “For Discussion and Possible Action.”

Chair, Teresa McKee

Vice Chair, Fran Almaraz

Shannon Chambers, Nevada Labor Commissioner

Teresa McKee, Chair, presented this item. Chair McKee noted that both the Agency Review and Policy Subcommittee and the Legislative and Industry Subcommittee had both met and appointed a Chair for their Subcommittees.

The Agency Review and Policy Subcommittee met on March 15, 2021 and heard presentations from the Nevada Department of Taxation and the Nevada Division of Industrial Relations.

The Legislative and Industry Subcommittee met on April 6, 2021 and heard a presentation about the “Benefits of Utilizing Independent Contractors.”

6. Legislative Updates.

Shannon Chambers, Nevada Labor Commissioner.

Ms. Chambers presented this item and provided information to the Task Force on the bills still moving forward in the 81st Session of the Nevada Legislature (2021) that involve potential changes to employment laws and on the topic of independent contractors. A final update on the bills that passed will be provided after the Legislative Session ends.

Margi Grein, Executive Officer, Nevada State Contractor’s Board, gave information on Assembly Bill 227, that would require a contractor to hire and utilize employees under the direction and control of the contractor. If passed, Assembly Bill 227 could reduce the improper use of 1099 employees on construction jobs where work is being performed that requires a contractor’s license and for work that is being performed by workers under the direction and control of the contractor.

7. Agenda Items for next Subcommittee meeting and Task Force meeting.

“For Discussion and Possible Action.”

The Task Force discussed potential agenda items for the next Task Force meeting including: Legislative Updates; Reports of Subcommittees; and Review of “Draft” Report to be submitted to the Nevada Legislature by July 1, 2021.

8. Public Comment.

There was no public comment.

9. Adjournment.

The meeting was adjourned at 10:37 a.m.

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**TASK FORCE ON EMPLOYEE MISCLASSIFICATION
AGENCY REVIEW AND POLICY SUBCOMMITTEE MEETING
MEETING MINUTES – MONDAY, MARCH 15, 2021**

1. **Call to Order and Roll Call.**

The meeting was called to order at 2:00 p.m. Roll Call and Quorum.

2. **Public Comment**

There was no public comment.

3. **“For Possible Action” - Appointment of Chair**

This item was taken out of order and presented as item 4. A motion was made by Margi Grein to appoint Rob Benner as the Chair of the Agency Review and Policy Subcommittee. The motion was seconded by Fran Almarz and passed unanimously.

4. **Overview of State of Nevada Department of Taxation**

Melanie Young, Executive Director & Terri Upton, Deputy Executive Director

Overview of State of Nevada Division of Industrial Relations

Victoria Carreon, Administrator

Victoria Carreon, Administrator of the Division of Industrial Relations (DIR), Donald Smith, Senior Legal Counsel, DIR, and Chuck Verre, Northern District Manager, DIR, presented an overview of the laws relating to workers compensation and independent contractors, and the enforcement provisions and the potential penalties if a worker is misclassified for workers compensation purposes.

Melanie Young, Executive Director of the Department of Taxation and Terri Upton, Deputy Director of the Department of Taxation presented an overview of the Modified Business Tax laws as they relate to independent contractors and what the Department of Taxation looks for when conducting audits.

The representatives from both DIR and the Department of Taxation agreed to work with the Subcommittee and the Task Force on Employee Misclassification and the Labor Commissioner going forward to address potential issues that may involve the misclassification of employees.

4. **Public Comment**

There was no public comment.

5. **Adjournment**

The meeting was adjourned at 2:47 p.m.

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**TASK FORCE ON EMPLOYEE MISCLASSIFICATION
LEGISLATIVE AND INDUSTRY SUBCOMMITTEE MEETING
MEETING MINUTES – APRIL 6, 2021**

1. Call to Order and Roll Call.

The meeting was called to order at 9:00 a.m. Roll Call and Quorum.

2. Public Comment.

There was no public comment.

3. “For Possible Action” - Appointment of Chair.

A motion was made by Teresa McKee, Chair and seconded by Fran Almaraz, Vice Chair, to appoint Mary Beth Hartleb as the Chair of the Legislative and Industry Subcommittee. The motion passed unanimously.

4. The Benefits of Utilizing Independent Contractors.

Mary Beth Hartleb – Chief Executive Officer (CEO), Prism HR

Ms. Hartleb presented this item. Ms. Hartleb presented the “Business Benefits” and “Individual Benefits” of utilizing independent contractors. The information noted that independent contractors play a vital role in the economy and in business operations and that the use of independent contractors and the choice to be an independent contractor may increase due to the COVID-19 public health emergency and certain individual situations related to family and location. The Subcommittee discussed the information presented on the “Top Positions for Independent Contractors Within Industry” and the categories that were included. Mr. Benner and Shannon Chambers, Labor Commissioner, commented on the use of the term “Administrative” for certain positions and how the duties may not align with the actual title, which could potentially lead to misclassification.

Teresa McKee, Chair, provided information on the use of independent contractors in the Real Estate Industry and Fran Almaraz, Vice Chair, added additional information about the use of independent contractors in the trucking industry and potential misclassification in that industry.

Ms. Hartleb provided information on an Internal Revenue Service study titled “Independent Contractors in the U.S.: New Trends from 15 Years of Tax Data.” The study covered 2001 to 2016 and was based on 1099 and W-2 data. According to the study, the State of Nevada had the highest growth rate of both employees and independent contractors during this period. The study data indicated that the top industries utilizing independent contractors are professional services, technology services, scientific services, other, and real estate.

5. Public Comment.

There was no public comment.

6. Adjournment.

The meeting was adjourned at 9:41 a.m.

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REPLY TO:

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TASK FORCE ON EMPLOYEE MISCLASSIFICATION 2021 ANNUAL REPORT

NRS 607.219 Task Force on Employee Misclassification: Duties; annual report. The Task Force on Employee Misclassification created by [NRS 607.218](#) shall:

1. Evaluate the policies and practices of the Labor Commissioner, Division of Industrial Relations of the Department of Business and Industry, Employment Security Division of the Department of Employment, Training and Rehabilitation, Department of Taxation and Attorney General relating to employee misclassification.
2. Evaluate any existing fines, penalties or other disciplinary action relating to employee misclassification that are authorized to be imposed by a state agency.
3. Develop recommendations for policies, practices or proposed legislation to reduce the occurrence of employee misclassification.
4. On or before July 1, 2020, and on or before July 1 of each subsequent year, submit a written report to the Director of the Legislative Counsel Bureau for submission to the Legislative Commission. The report must include, without limitation, a summary of the work of the Task Force and recommendations for legislation concerning employee misclassification.

I. CREATION AND APPOINTMENT OF TASK FORCE

The Task Force on Employee Misclassification (Task Force) was created through the passage of Senate Bill (SB) 493 during the 80th Regular Session of the Nevada Legislature (2019). The statutory provisions governing the Task Force are set forth in Nevada Revised Statutes (NRS) sections 607.218 through 607.2195. (Attached as Appendix A)

NRS 607.218 Task Force on Employee Misclassification: Creation; appointment, qualifications and terms of members; vacancies; meetings; Chair and Vice Chair; quorum; compensation; administrative support.

1. The Task Force on Employee Misclassification is hereby created.
2. The Governor shall appoint to serve on the Task Force:
 - (a) One person who represents an employer located in this State that employs more than 500 full-time or part-time employees.
 - (b) One person who represents an employer located in this State that employs 500 or fewer full-time or part-time employees.
 - (c) One person who is an independent contractor in this State.
 - (d) Two persons who represent organized labor in this State.
 - (e) One person who represents a trade or business association in this State.
 - (f) One person who represents a governmental agency that administers laws governing employee misclassification.

3. The Governor may appoint up to two additional members to serve on the Task Force as the Governor deems appropriate.
4. After the initial terms, the members of the Task Force serve a term of 2 years and until their respective successors are appointed. A member may be reappointed in the same manner as the original appointments.
5. Any vacancy occurring in the membership of the Task Force must be filled in the same manner as the original appointment not later than 30 days after the vacancy occurs.
6. The Task Force shall meet at least twice each fiscal year and may meet at such additional times as deemed necessary by the Chair.
7. At the first meeting of each fiscal year, the Task Force shall elect from its members a Chair and a Vice Chair.
8. A majority of the members of the Task Force constitutes a quorum for the transaction of business, and a majority of those members present at any meeting is sufficient for any official action taken by the Task Force.
9. The Task Force shall comply with the provisions of [chapter 241](#) of NRS, and all meetings of the Task Force must be conducted in accordance with that chapter.
10. Members of the Task Force serve without compensation.
11. The Labor Commissioner shall provide the personnel, facilities, equipment and supplies required by the Task Force to carry out its duties.

Because of the COVID-19 public health emergency, the appointments to the Task Force were not made until October 2020, with the full Task Force appointments being completed by November 2020.

There are currently 8 members on the Task Force and the Labor Commissioner supports the Task Force. (Attached as Appendix B)

II. MEETINGS AND SUBCOMMITTEES OF TASK FORCE

Upon the appointment of the Task Force, the Labor Commissioner initiated outreach to the Task Force members about the creation of the Task Force through Senate Bill 493 (2019) and the duties of the Task Force.

The Task Force is only required to meet twice each fiscal year. At the first meeting the Task Force shall elect a Chair and Vice Chair. The Task Force has authority to create Subcommittees pursuant to NRS section 607.2195. The Task Force elected a Chair and Vice Chair, met 6-times during this fiscal year, and created the following Subcommittees:

AGENCY REVIEW AND POLICY SUBCOMMITTEE LEGISLATIVE AND INDUSTRY SUBCOMMITTEE

Meeting Dates:

Regular Meetings: January 23, 2021; February 23, 2021; April 6, 2021; and June 6, 2021

Subcommittee Meetings: March 15, 2021 – Agency Review and Policy Subcommittee
April 6, 2021 – Legislative and Industry Subcommittee

III. TASK FORCE ACTIVITIES AND PRESENTATIONS

The Task Force reviewed the current laws and regulations governing misclassification and independent contractors and heard presentations from the Nevada Labor Commissioner www.labor.nv.gov, the Nevada Department of Taxation <https://tax.nv.gov/>, Nevada Division of Industrial Relations <https://dir.nv.gov/>, and the United States Department of Labor www.dol.gov. Due to the COVID-19 public health emergency and the 81st Regular Session of the Nevada Legislature (2021), the Task Force was unable to hear from the Office of the Attorney General and the Department of Employment, Training and Rehabilitation.

The Task Force heard additional presentations on the “Benefits of Utilizing Independent Contractors” and was provided an overview of the federal laws and changes to the independent contractor rule at the federal level. The United States Department of Labor withdrew the previous rule that was issued under the Trump Presidential Administration that would have narrowed the definition of employee under the Fair Labor Standards Act (FLSA). <https://www.dol.gov/newsroom/releases/whd/whd20210505>

The Task Force reviewed reports including the Institute for Construction Economic Research (ICERES) – “Payroll Fraud in Nevada’s Construction Industry” [Welcome to Southern Nevada Building Trades | Payroll Fraud in Nevada’s Construction Industry \(snbtu.org\)](#); “Independent Contractors in the U.S - New Trends from 15 Years of Tax Data (2001-2016”); and the “2009 Findings and Report from the Subcommittee of the Nevada Legislature to Study Misclassification.” (Attached as Appendix C)

The Task Force reviewed the various industries that utilize independent contractors and discussed the industries where employee misclassification has been found to have occurred including, in the construction industry and in the home health care industry.

The Labor Commissioner issued updated bulletins and guides on the issue of misclassification.

<https://labor.nv.gov/uploadedFiles/labornvgov/content/Employer/Tips%20to%20Avoid%20Misclassification.pdf>

<https://labor.nv.gov/uploadedFiles/labornvgov/content/Employer/Independent%20Contractor%20-%20Information%20Sheet.pdf>

IV. 2021 LEGISLATIVE BILLS TO ADDRESS MISCLASSIFICATION

Assembly Bill (AB) 227 – Nevada State Contractors’ Board – Requires contractors to utilize and employ workers who are employees under the direction and control of the contractor and defines what an “employee” is under the direction and control of the contractor.

<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7666/Text>
Signed by Governor on May 28, 2021 – Effective Date October 1, 2021

Senate Bill (SB) 55 – Moves the licensure of “employee leasing companies” to the Nevada Labor Commissioner and changes the definition and name of “employee leasing companies to “professional employer organizations.” Allows the Nevada Labor Commissioner to impose administrative penalties of up to \$5,000.00 per violation.

<https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7237/Text>

Enrolled and delivered to Governor on June 2, 2021 – Effective Date July 1, 2021

Senate Bill 340 – Establishes the Home Care Employment Standards Board and authorizes the Labor Commissioner to investigate the wages and working conditions of home health care workers. <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7977/Overview>

Enrolled and delivered to the Governor on June 2, 2021 – Effective Date October 1, 2021

V. RECOMMENDATIONS FROM THE TASK FORCE

The Task Force studied the issues related to misclassification during the COVID-19 public health emergency. The COVID-19 public health emergency has caused unexpected job loss and economic hardship across the country. The closure of businesses and employee job loss and layoffs has been extremely high in the State of Nevada because of the tourism-based economy.

The “way people work” also changed because of the pandemic, with more people working from home and more people wanting a flexible work-schedule to address online schooling, childcare, health issues, family issues, etc. This is unlikely to change, with many people wanting to work as independent contractors and businesses wanting to utilize independent contractors. It is important to recognize the positive role those independent contractors play in various industries, and the important economic contributions that independent contractors provide to the economy as a whole and to the economy in the State of Nevada.

The rollout of vaccines to combat COVID-19 has improved the economic picture across the country and in the State of Nevada, and many workers are being brought back to work. The new reality now is that businesses and employers are having trouble finding employees to fill the thousands and thousands of open jobs/positions that now exist across the country as a result of the improving economy.

The issue of misclassification is one that is being studied and researched across many states across the country. [Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf \(pcdn.co\)](#) (Attached as Appendix D) While the proposed recommendations to address the issue of misclassification may vary from state to state, the new Secretary of Labor, Marty Walsh, United States Department of Labor, has signaled the direction that the United States Department of Labor may be heading when it comes to “Gig Workers” and independent contractors.

“We are looking at it, but in a lot of cases gig workers should be classified as employees,” Walsh [told Reuters](#). “These companies are making profits and revenue and I’m not (going to) begrudge anyone for that, because that’s what we are about in America. But we also want to make sure that success trickles down to the worker.” Secretary of Labor Marty Walsh on April 29, 2021. <https://www.washingtonpost.com/business/2021/04/29/labor-walsh-gig-workers-employees/>

It is possible that the proposed language of Assembly Bill 5 introduced in the State of California and ultimately overturned by the voters in Proposition 22 could become the proposed rule from the United States Department of Labor in 2021.

“A person is an employee rather than an independent contractor unless:

1. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The person performs work that is outside the usual course of the hiring entity’s business.
3. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”

RECOMMENDATIONS:

- Continue to monitor any new proposed regulations/rules on independent contractors that may be issued by the United States Department of Labor.
- If the United States Department of Labor issues new regulations/rules on independent contractors and misclassification, those should be considered and potentially brought as “Bill Draft Requests” to change the laws under the Labor Commissioner and potentially the other agencies listed in NRS section 607.219.
- A working group/investigative group consisting of members of the Labor Commissioner, Nevada State Contractor’s Board, Nevada Department of Taxation, Nevada Division of Industrial Relations, Department of Employment, Training, and Rehabilitation, and Office of the Attorney General could be formed and meet regularly to share information on misclassification cases.
- Statutes and/or regulations that prohibit the sharing of investigative information relating to misclassification between agencies should be reviewed for potential changes.
- The penalties and/or administrative fines for misclassification under the Labor Commissioner could be increased to \$5,000.00 or more per violation.
- A “standard” definition for misclassification could be included in the various NRS provisions governing the agencies listed in NRS section 607.219 similar to the definition of “misclassification” enforced by the Labor Commissioner in NRS section 607.216.
- The current Memorandums of Understanding (MOU) between the Labor Commissioner and Nevada State Contractor’s Board and the Labor Commissioner and United States Department of Labor should be continued.
- Additional MOU’s may need to be executed between the United States Department of Labor and the agencies listed in NRS section 607.219.
- Continue to allow and promote the use of independent contractors in various trades, professions, and industries based proper licensure (as necessary) in accordance with the applicable NRS and Nevada Administrative Code (NAC) sections, and in compliance with the provisions of NRS section 608.0155 and Nevada Administrative Code (NAC) section 608.155 under the jurisdiction of the Nevada Labor Commissioner.
- Evaluate the use of independent contractors in a post COVID-19 economy.